Subramanyah a/l AJ Karuppiah v Bank Negara Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–205 OF 2001
LOW HOP BING, RAMLY ALI AND T SELVENTHIRANATHAN JJCA
1 DECEMBER 2009

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Civil Procedure — Appeal — Leave to include additional ground of appeal — Whether new point could be raised and argued at appellate stage — Whether additional ground of appeal fell within any one of established exceptions accepted by courts — Whether addition would be prejudicial to BNM

C

Labour Law — Employment — Dismissal — Appellant sought declaration that his dismissal was null and void and of no effect, reinstatement and arrears of salary — High Court dismissed claim — Appeal against order — Whether BNM failed to comply with Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 — Whether appellant eligible for protection and benefits under the General Orders — Whether appellant entitled to reinstatement — Whether appellant had right to mitigate — Whether appellant afforded opportunity to mitigate before his dismissal — Whether dismissal appropriate — Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 s 4(2) — Central Bank of Malaysia Act 1958 s 3

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The appellant was employed by Bank Negara Malaysia ('BNM') under a contract of employment vide a letter of employment dated 26 January 1981 and was subjected to the terms and conditions contained therein and as further imposed by BNM from time to time. The appellant was given a notice to show cause dated 11 April 1989, which detailed five charges of disciplinary misconduct made against him by BNM. On 24 May 1989 a disciplinary inquiry was convened to enquire into the allegations of misconduct against the appellant. After considering all the evidence tendered the disciplinary committee found the appellant's explanation to be unsatisfactory and found him guilty under s 4(2) of the Public Officers (Conduct and Discipline) and General Orders 1980 ('the general orders'). Accordingly the appellant's employment with BNM was terminated. The appellant appealed against his dismissal to the Governor of BNM by a letter dated 24 July 1989. In the said letter the appellant mitigated against the punishment. When the appellant's appeal was rejected, he filed a claim against BNM in the High Court. By way of this action the appellant sought, inter alia, a declaration that his dismissal was null and void and of no legal effect, for a declaration that he be reinstated without loss of opportunities, all arrears of salary and damages with interest thereon. The High Court dismissed the appellant's claim and hence the present

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appeal. In this appeal, the appellant applied for leave to include an additional ground, which was allegedly inadvertently excluded by the appellant's previous solicitors. This additional ground, which was related to the unsatisfactory leave records and leave applications of the appellant while he was an employee in BNM, was not raised by the appellant during the trial before the High Court. The appellant's main contentions in this appeal were that BNM had failed to comply with the general orders and that he was not afforded an opportunity to mitigate before his dismissal punishment was imposed upon him by BNM. BNM, on the other hand, maintained that the general orders would not be applicable to the appellant and that he was not at liberty to demand for compliance with the same.

Held, dismissing the appeal with costs:

(1) It is trite law that the appellate court did not allow a new point that was not raised in the court below to be raised and argued at the appellate stage unless that new point came within the established exceptions. In this case, the additional ground, which the appellant sought leave to include in this appeal was a new point that was neither raised by the appellant during the trial before the High Court nor put to the witnesses of BNM when the disciplinary committee was convened to enquire into the allegations of misconduct against the appellant. As the additional ground did not fall within any one of the established exceptions accepted by the courts it should not be allowed. Further, the new point sought to be raised by the appellant would be prejudicial to BNM, as its material witnesses were not afforded an opportunity to defend these allegations at the disciplinary committee stage (see paras 15–18).

(2) As BNM is a statutory body incorporated under s 3 of the Central Bank of Malaysia Act 1958 and its officers and employees are appointed by BNM they are subject to such terms and conditions of service as determined by BNM. The appellant was employed by BNM under a contract of employment which did not make any specific reference to the applicability of the general orders. In the circumstances, the appellant did not fall within the categories of public officer or employees as set out in art 132 of the Federal Constitution ('Constitution') and was not eligible for the protection and benefits under the general orders. Although BNM was at liberty to incorporate all or any part of the general orders as its own terms and conditions of employment, this did not mean that the appellant could seek protection under the general orders or demand compliance with the same (see paras 30–32 & 34).

(3) Further, the relief of reinstatement was only open to employees who lodged a claim for unfair dismissal under s 20 of the Industrial Relations Act 1967, or to a holder of a public office under art 132 of the Constitution. As the appellant did not come within those categories of

employees to whom the relief of reinstatement was available he was not entitled to reinstatement, and his only remedy, if any, should be for breach of contract and damages. However, in the present case although the appellant claimed for damages, he had not pleaded the issue of breach of contract by BNM and this failure to plead breach of contract was fatal to his case. The appellant also failed to establish that in dismissing him. BNM was in breach of the employment contract between him and BNM (see paras 37–39).

(4) Since the general orders did not apply to this case and as there was no express provision relating to the right to mitigate upon punishment to be accorded to the appellant the irresistible conclusion was that no such right ought to be meted out to the appellant. In any event the representation made by the appellant to the Governor of BNM by a letter dated 24 July 1989 before the punishment was affirmed was sufficient to amount to a mitigation (see para 45).

(5) The five charges of misconduct against the appellant were serious in nature. Being the employer, BNM was in the best position to determine the seriousness of the appellant's misconduct. As such, it was reasonable for BNM to have taken the view that dismissal was the appropriate punishment (see paras 46–47).

[Bahasa Malaysia summary

Perayu telah diambil bekerja dengan Bank Negara Malaysia ('BNM') di bawah kontrak pekerjaan melalui surat pekerjaan bertarikh 26 Januari 1981 dan tertakluk kepada terma dan syarat yang terkandung di dalamnya dan sepertimana yang ditetapkan oleh BNM dari masa ke semasa. Perayu telah diberikan notis tunjuk sebab bertarikh 11 April 1989, yang menyenaraikan lima pertuduhan salah laku tatatertib yang dibuat terhadapnya oleh BNM. Pada 24 Mei 1989 satu siasatan tatatertib telah diadakan untuk menyiasat dakwaan salah laku terhadap perayu. Setelah mempertimbangkan kesemua keterangan yang ditenderkan jawatankuasa tatatertib mendapati penjelasan perayu tidak memuaskan dan mendapatinya bersalah di bawah s 4(2) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('perintah am'). Oleh demikian pekerjaan perayu dengan BNM telah ditamatkan. Perayu telah merayu terhadap pemecatannya kepada Gabenor BNM melalui surat bertarikh 24 Julai 1989. Dalam surat tersebut perayu mohon mitigasi terhadap hukuman. Apabila rayuan perayu ditolak, dia telah memfailkan tuntutan terhadap BNM di Mahkamah Tinggi. Melalui tindakan ini perayu memohon, antara lain, deklarasi bahawa pemecatannya terbatal dan tak sah dan tiada kesan, untuk satu deklarasi agar dia dikembalikan kepada jawatan asal tanpa kehilangan peluang, semua tunggakan gaji dan ganti rugi beserta faedah. Mahkamah Tinggi telah menolak tuntutan perayu dan justeru rayuan ini. Dalam rayuan ini, perayu memohon kebenaran memasukkan alasan tambahan yang dikatakan tidak dimasukkan dengan sengaja oleh bekas

peguamcara perayu. Alasan tambahan ini yang berkaitan rekod cuti dan permohonan cuti perayu semasa dia pekerja di BNM tidak dibangkitkan semasa perbicaraan di Mahkamah Tinggi oleh perayu. Hujah utama perayu dalam rayuan ini adalah bahawa BNM telah gagal mematuhi perintah am dan bahawa dia tidak wajar diberikan peluang membuat mitigasi terhadap hukuman pemecatannya yang dikenakan ke atasnya oleh BNM. BNM sebaliknya mengekalkan bahawa perintah am tidak terpakai ke atas perayu dan bahawa dia bebas menuntut pematuhan yang sama.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah undang-undang tetap bahawa mahkamah rayuan tidak membenarkan poin baru yang tidak dibangkitkan di mahkamah bawahan dibangkitkan dan dihujahkan di peringkat rayuan kecuali poin baru tersebut terangkum dalam pengecualian yang ditetapkan. Dalam kes ini, alasan tambahan itu, yang dipohon oleh perayu agar dimasukkan dalam rayuan ini adalah poin baru yang tidak pernah dibangkitkan oleh perayu semasa perbicaraan di Mahkamah Tinggi mahupun dikemukakan kepada saksi-saksi BNM semasa jawatankuasa tatatertib bersidang untuk menyiasat dakwaan salah laku terhadap perayu. Oleh kerana alasan tambahan itu tidak terjatuh dalam mana-mana pengecualian yang ditetapkan yang diterima oleh mahkamah ia wajar tidak dibenarkan. Selanjutnya poin baru yang dipohon untuk dibangkitkan oleh perayu adalah prejudis kepada BNM kerana saksi-saksi utamanya tidak diberikan peluang untuk membela diri terhadap dakwaan berikut di peringkat jawatankuasa tatatertib (lihat perenggan 15–18).

(2) Oleh kerana BNM adalah badan berkanun yang diperbadankan di bawah s 3 Akta Bank Negara Malaysia 1958 dan pegawai dan pekerjanya dilantik oleh BNM mereka tertakluk kepada terma dan syarat perkhidmatan sedemikian sepertimana yang ditetapkan oleh BNM. Perayu telah diambil bekerja oleh BNM di bawah kontrak pekerjaan yang tidak membuat apa-apa rujukan spesifik kepada pemakaian perintah am. Dalam keadaan berikut, perayu tidak terjatuh dalam kategori pegawai awam atau pekerja seperti yang ditetapkan dalam perkara 132 Perlembagaan Persekutuan ('perlembagaan') dan tidak layak untuk mendapat perindungan dan faedah di bawah perintah am. Meskipun BNM bebas memperbadankan semua atau mana-mana bahagian perintah am seperti terma dan syarat pekerjaannya, ini tidak bermaksud bahawa perayu boleh mendapat perlindungan di bawah perintah am atau menuntut pematuhan yang sama (lihat perenggan 30–32 & 34).

(3) Selanjutnya, relief pengembalian ke jawatan asal hanya terbuka kepada pekerja yang membuat aduan kerana pemecatan tidak adil di bawah s 20

Akta Perhubungan Perusahaan 1967, atau kepada pemegang pegawai awam di bawah perkara 132 Perlembagaan. Oleh kerana perayu tidak terangkum di bawah kategori pekerja tersebut yang mana pengembalian ke jawatan asal sedia ada dia tidak layak mendapat pengembalian ke jawatan asal, dan satu-satunya remedinya, jika ada, hendaklah kerana pelanggaran kontrak dan ganti rugi. Walau bagaimanapun, dalam kes ini meskipun perayu menuntut ganti rugi, dia tidak memplid isu pelanggaran kontrak oleh BNM dan kegagalan memplid untuk pelanggaran kontrak ini membawa mudarat kepada kesnya. Perayu juga gagal membuktikan bahawa dengan memecatnya, BNM telah melanggar kontrak pekerjaan antara dia dan BNM (lihat perenggan 37–39).

(4) Oleh kerana perintah am tidak terpakai dalam kes ini dan oleh kerana tiada peruntukan nyata berkenaan hak untuk mitigasi terhadap hukuman diberikan kepada perayu maka kesimpulannya adalah bahawa tiada hak patut diberikan kepada perayu. Dalam apa keadaan representasi yang dibuat oleh perayu kepada Gabenor BNM melalui surat bertarikh 24 Julai 1989 sebelum hukuman disahkan adalah memadai untuk membentuk mitigasi (lihat perenggan 45).

(5) Kelima-lima pertuduhan salah laku terhadap perayu bersifat serius. Sebagai majikan, BNM berada dalam kedudukan terbaik untuk menentukan keseriusan salah laku perayu. Oleh demikian, adalah munasabah untuk BNM mengambil pandangan bahawa pemecatan tersebut merupakan hukuman yang sesuai (lihat perenggan 46–47).]

Notes

For cases on appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 703–1701.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1037–1098.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)

Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (refd)

Mohd bin Ahmad v Yang diPertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361, FC (refd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)

Regina v Gaming Board for Great Britain, Ex parte Benaim and Khaida [1970] 2 QB 417, CA (refd)

Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233, PC (refd)
Ridge v Baldwin and others [1964] AC 40, HL (refd)
S Mariappan v Government of Malaysia [1983] 2 MLJ 340, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (folld)
United Marketing Co v Hasham Kara [1963] MLJ 261, PC (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 ss 3, 15(2)
Federal Constitution arts 132, 132(2), 135, 135(2)
Industrial Relations Act 1967 s 20
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general orders 2, 4(2)(g), (i), (f), Part 1

Appeal from: Suit No S8(S4)–21–75 of 1992 (High Court, Kuala Lumpur)

M Manoharan (M Manoharan & Co) for the appellant.
Janice Leo (Syarihah Razman with her) (Shook Lin & Bok) for the respondent.

Ramly Ali JCA:

INTRODUCTION

[1] This is an appeal against the judgment of the High Court dated 30 January 2001 dismissing the appellant's suit with costs against his employer, Bank Negara Malaysia ('BNM'), the respondent.

[2] The appellant's claim against BNM are as follows:

(a) for a declaration that his dismissal on 12 July 1989 vide letter dated 12 July 1989 from the Chairman, Disciplinary Committee of BNM, as a general assistant lower grade, is null and void and of no legal effect and that he is still a general assistant, lower grade;

(b) for an order for an account of all arrears of salary, allowance and other emoluments that he ought to receive from the date of dismissal and the same be paid to him;

(c) for a declaration that he be reinstated without any loss of rank, opportunities for promotion or any other benefits;

(d) for damages;

(e) for interest on the sum adjudged from the date of judgment until satisfaction; and

(f) further or other reliefs deemed fit and proper by the court.

FACTUAL BACKGROUND

[3] The appellant was employed by BNM vide a letter of appointment dated 26 January 1981 as 'Kakitangan Matawang (Sementara)'. One of the terms of the employment is that 'kakitangan sentiasa dikehendaki patuh kepada syarat-syarat kerja yang telah ditentukan oleh Bank Negara Malaysia'.

[4] While in employment, the appellant's conducts were not satisfactory. On or about 11 April 1989, BNM issued a notice to show cause to the appellant setting out various allegations of misconducts against him. The alleged misconducts were:

(a) entering the work place (ie mail section) without security pass;

(b) persistent late coming or leaving the work place early;

(c) absent from work;

(d) refusal to furnish information about his reasons for being absent;

(e) offences of insubordination; and

(f) wrongfully declared himself as being BNM's chief security officer.

[5] In the same notice, the appellant was required to provide a written explanation on all the allegations made against him. Paragraph 6 of the said notice states:

> 6 Dengan ini, saudara adalah diminta memberi jawapan kepada pertuduhan yang dikemukakan dengan memberi sebab mengapa tindakan tatatertib tidak sepatutnya diambil ke atas saudara kerana telah melanggar peraturan-peraturan tatatertib. Jawapan dan hujjah saudara hendaklah dikemukakan kepada Pengurus, Jabatan Personel dalam tempoh 14 hari dari tarikh surat ini. Sekiranya saudara tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan, saudara akan dianggap tidak mahu membela diri dan perkara ini akan diputuskan berdasarkan keterangan-keterangan yang ada sekarang ini sahaja.

[6] On 24 April 1989, the appellant responded to provide his three pages written explanation to the said notice.

[7] On 24 May 1989, the first disciplinary inquiry was convened to enquire into the allegations of misconduct against the appellant. The appellant and three other witnesses were called. The appellant attended and was afforded all opportunity to explain or defend the allegations against him by the disciplinary committee.

[8] The appellant was subsequently given an opportunity to produce further documentary evidence to support his explanations to the said allegations during the second disciplinary inquiry held on 31 May 1989. By a letter dated 30 May 1989, the appellant provided further explanations and documentary evidence relating to the allegations of misconduct against him.

[9] After considering all the facts and evidence placed before it, the disciplinary committee found the appellant's explanation to be unsatisfactory and the appellant was found guilty under paras 4(2)(g), (i), (f) of the Public Officers (Conduct and Discipline) (Cap D) the General Orders 1980 ('general orders'). Accordingly, the appellant's employment with BNM was terminated.

[10] The appellant was duly informed of the decision vide letter dated 12.7.1989. In the same letter, the appellant was also informed of his right to appeal to the Governor of BNM within 14 days against the punishment imposed.

[11] By a letter dated 24 July 1989, the appellant appealed against his dismissal to the governor of BNM. In the said five paragraphs letter the appellant acknowledged his mistake and mitigated against the punishment; and requested he be allowed to continue employment with BNM. The Governor of BNM, by letter dated 13 April 1990, rejected the appellant's appeal.

[12] The appellant then filed a claim against BNM in the High Court for the various declarations and damages. The High Court dismissed his claim. Hence the present appeal before this court.

THE APPELLANT'S APPLICATION FOR LEAVE TO INCLUDE A FURTHER GROUND OF APPEAL IN THE MEMORANDUM OF APPEAL

[13] At the outset, the appellant made an application (vide encl 22a) for leave of the court to include a further ground of appeal in the memorandum of appeal. The additional ground is:

> Yang Arif Hakim perbicaraan yang bijaksana telah tersalah dalam tidak memutuskan bahawa:
>
> Perkara-perkara 'extraneous' telah dipertimbangkan oleh jawatankuasa Tatatertib apabila membuat keputusannya untuk membuang kerja plaintif. Plaintif tidak diberi peluang untuk menyatakan apa-apa tentang perkara-perkara 'extraneous' tersebut dan ini menyebabkan keputusan yang diambil itu cacat (fatally flawed).

[14] The reason given in support of this application in that the said further ground was inadvertently excluded by the previous solicitors having conduct of the matter. A

[15] On this issue, it is trite that as a general rule, the appellate court does not allow a new point which was not raised in the court below to be raised and argued for the first time at the appellate stage. In the Privy Council case of *United Marketing Co v Hasham Kara* [1963] MLJ 261, it is stated that a point not taken in the lower court will not be allowed to be argued unless the court is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. In *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233, the Privy Council has also held that even if the facts are beyond dispute the court would not readily allow a fresh point of law to be argued without the benefit of the judgment of the judges in the court below (both the above cited cases were followed by the Federal Court in the case of *S Mariappan v Government of Malaysia* [1983] 2 MLJ 340). B C D

[16] In order to justify the new point to be raised on appeal, it must be shown that the new point comes within the established exceptions, ie jurisdiction, illegality or where, if the evidence on which the appellate court is asked to decide, if investigated, would fully support the new plea (see *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416). E

[17] In the present case, the new point relating to the extraneous issue (touching on the issue of unsatisfactory leave records of and leave applications by the appellant) was not raised by the appellant during the trial before the High Court. The appellant did not lead any evidence on the issues nor were they put to the witnesses of BNM that the extraneous issues were actually considered by the disciplinary committee. It is trite law that the failure to put one's case to his opponent's material witnesses would preclude the former from raising it in his argument (see *Browne v Dunn* (1893) 6 R 67; and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770). The ground for the appellant's application does not fall within any one of the established exceptions accepted by the courts. To allow such an application would result in allowing a new line of defence or plea without hearing fresh evidence. F G H

[18] The new point sought to be raised on appeal by the appellant would be prejudicial to BNM as the respondent, as its witnesses were not afforded an opportunity to respond or defend the appellant's allegation that the extraneous issues were considered by the disciplinary committee (see the Federal Court decision in *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). I

[19] On the above considerations, the court unanimously dismissed the appellant's application (vide encl 22a) with costs.

APPEAL PROPER: ISSUES TO BE DETERMINED

[20] The issues for determination before this court (as well as the court below) are limited to the following:

(a) whether the general orders 1980 were applicable to the present case and, if the answer is in the affirmative, whether it has been complied with; and

(b) whether the decision of BNM was fatally flawed on the ground that the appellant was not given the opportunity to mitigate before the punishment of dismissal was imposed on the appellant.

THE APPELLANT'S MAIN CONTENTIONS

[21] The appellant's main contentions before this court (and the court below) are that:

(a) the general orders are applicable to the appellant in this case and therefore he was entitled to all the rights and benefits thereunder particularly on the issues of reinstatement and right to be heard; and

(b) the appellant in this case was not afforded an opportunity to mitigate before his dismissal punishment was imposed by the disciplinary authority of BNM.

BNM'S CONTENTIONS

[22] BNM on the other hand maintained that the General Orders (Chapter D) 1980 would not be applicable to the appellant and accordingly the appellant is not at liberty to demand for the compliance with the same. BNM also maintained that, in any event, the requirements of natural justice entrenched in the general orders (ie for a fair hearing) were complied with in this case as the appellant was afforded the opportunity to be heard (in the form of written explanations as well as oral representations) and also to mitigate before the final decision by the Governor of BNM to dismiss him from his employment with BNM, was affirmed.

DECISION OF THE HIGH COURT

[23] The learned High Court judge ruled in favour of BNM. On the issue of whether the general orders is applicable to the appellant or not, His Lordship made the following findings:

... Perintah-perintah Am Bab 'D' adalah untuk kakitangan kerajaan mengikut Suruhanjaya yang dibentuk mengikut fasal tertentu dalam Perlembagaan Malaysia. Kakitangan Bank Negara berkerja mengikut kuasa-kuasa yang diberi melalui Akta Bank Pusat Malaysia 1958. Bank Negara yang demikian, adalah suatu badan berkanun dan pekerja-pekerjanya bekerja mengikut peraturan-peraturan yang ditetapkan oleh Bank Negara sendiri bukannya mengikut Perintah-Perintah Am.

[24] In respect of the reference to the general orders in the documentations in BNM's disciplinary proceeding against the appellant, particularly in the notice to show cause issued to the appellant, the learned judge made the following findings:

... Kepada saya Bab 'D' yang digunakan merupakan suatu mekanisme (peraturan) untuk penyiasatan. Ini kepada saya tidak menjadikan plaintif seorang kakitangan kerajaan yang boleh berlindung di bawah Perintah Am yang ditubuhkan khas untuk kakitangan kerajaan. Dengan lain-lain perkataan khidmat plaintif dengan defendan adalah antara plaintif dengan defendan, suatu badan berkanun.

[25] In respect of the allegation of denial of the right to mitigate, the learned judge ruled as follows:

Gabenor BNM adalah ketua eksekutif defendan. Rayuan telah dibuat kepadanya untuk meringankan hukuman ke atas plaintif setelah plaintif dimaklumkan keputusan jawatankuasa.

FINDINGS OF THIS COURT

On the issue of the General Orders (Chapter D) 1980

[26] The general orders were made expressly by the Yang di-Pertuan Agong in pursuance of power conferred by cl (2) of art 132 of the Federal Constitution. They were designed to give substance to the traditional degree of security of tenure to such holders of public offices who hold office during the pleasure of the Yang di-Pertuan Agong in respect of any conduct of the holder considered to be misconduct by the body that appoints him.

[27] Order 2 of Part 1 of the General Orders specifically states that the General Orders are applicable to public officers who hold office in the public offices as set out in art 132 of the Federal Constitution which comprises of public offices in the armed forces, the judicial and legal service, the general public service of Malaysia, the police force, the education service, the joint federal and state public services and finally the public service of each state.

[28] Generally, public officers enjoy special protection as conferred by art 135 of the Federal Constitution which provides that no holder of such office

shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor shall he be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him.

[29] Another benefit for being a public officer is that he may be entitled to claim any declaration that his dismissal is void and invalid; and claim for reinstatement. For other employees who are not public officers, the appointments are based purely on contract. They can only claim for a declaration that his dismissal is wrongful and claim for damages, but not reinstatement (see the Federal Court decision in *Mohd bin Ahmad v Yang diPertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361).

[30] In the present case, it is not in dispute that the appellant was employed by BNM under a contract of employment vide a letter of appointment dated 26 January 1981 and was subjected to the terms and conditions contained therein and as further imposed by BNM from time to time. Paragraph 2(f) of the said letter of appointment specifically states 'kakitangan-kakitangan sentiasa dikehendaki patuh kepada syarat-syarat kerja yang ditentukan oleh Bank Negara Malaysia'. The said contract does not make any specific reference to the applicability of the General Orders (Cap D).

[31] BNM is a statutory body or a body corporate established under s 3 of the Central Bank of Malaysia Act 1958 (revised in 1994). The officers and employees of BNM are appointed by BNM, under s 15 of the same Act. They hold office for such period, receive such salaries and allowances, and are subject to such other terms and conditions of service as may be determined by the board of BNM.

[32] Clearly the appellant does not fall within the categories of public officer or employees as set out in art 132 of the Federal Constitution, and therefore is not eligible for the protection and benefits under the general orders.

[33] The appellant argued that the general orders were applicable in his case because of their incorporation in the notice to show cause dated 11 April 1989 as well as in the letter dated 12 July 1989 issued by BNM informing him of the decision of the disciplinary committee to dismiss him.

[34] As stated earlier, under s 15(2) of the Central Bank of Malaysia Act 1958 (revised 1994) BNM is empowered to determine such terms and conditions of service or employment for its officers and employees. In doing that, BNM is at liberty to adopt or incorporate all or any part of the general

orders as its own terms and conditions of service or employment. The adoption or incorporation of such general orders in the appellant's notice to show cause and letter of decision by the disciplinary committee, does not have the legal effect of making him a holder of any such public office as categorised under art 132 of the Federal Constitution. It does not translate to the general orders being applicable to the appellant, nor does it create a right for the appellant to seek protection under the general orders or to demand compliance with the same.

[35] The Federal Court in *Mohd bin Ahmad*'s case had expressed the same ruling on the same issue:

> In our view, the position is that the incorporation of such general orders into the supervisor's contract of service does not have the legal effect of making him a holder of any such public office as categorised under art 132 of the Federal Constitution … Two parties to a contract cannot confer on either of themselves, to be legally acceptable, a specific statutory status, provided by a statute; in this case, art 132 of the Federal Constitution, the supreme statute.

[36] On the issue of reinstatement as claimed by the appellant, the court is guided by the principle adopted by the Federal Court in *Mohd bin Ahmad*'s case as follows:

> … that the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss him in breach of such contract without any danger of being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue for damages. The principle is that the court will not order specific performance of a contract of personal service … Following the principle aforesaid, the logical result will be that dismissed employee cannot claim any declaration that 'his dismissal was void' and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, eg he was dismissed in breach of the contract of service and that he claims damages for such breach.

[37] The Federal Court, in the same case, further explained that the relief of reinstatement is only open to employees who lodge a claim for unfair dismissal pursuant to s 20 of the Industrial Relations Act 1967, or to a holder of a public office as categorised under art 132 of the Federal Constitution.

[38] On the above authorities, the court is satisfied that as the appellant does not come within the categories cited above, the relief of reinstatement is not available to him; and his only remedy, if any, should be for breach of contract and damages.

[39] In the present case, the appellant also claims for damages. However there is no indication that the appellant claims for a declaration that his dismissal was done wrongfully on a breach of contract by BNM. The issue of 'breach of contract by BNM' is not pleaded at all in the appellant's pleadings and statements of claim. The failure to plead such cause of action for 'breach of contract' is fatal to the appellant's case. The appellant has also failed to establish by evidence that in dismissing him, BNM was in breach of the employment contract between him and BNM. This principle was clearly laid down by the Federal Court in *Mohd bin Ahmad*'s case that '… he was entitled to claim damages only if he could establish that his dismissal was in breach of his contract of service'.

On the issue of 'opportunity to mitigate'

[40] The terms and conditions of employment of the appellant do not include a mandatory right to mitigate before a punishment is imposed by the disciplinary committee of BNM.

[41] The court is fully aware that the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action. He must be accorded fair hearing by the adjudicating authority; but the hearing may take many forms and does not require the strict insistence upon an inexorable right to the traditional courtroom procedure. The adjudicating authority has a duty to act fairly (see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; *Ridge v Baldwin and others* [1964] AC 40; and *Regina v Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417).

[42] In this regard, the appellant in the present case was given a notice to show cause dated 11 April 1989 detailing all the allegations of disciplinary misconducts made against him. He was afforded the chance to explain and to make representation orally as well as in writing, and to furnish documentary evidence to support his explanations. Finally, the appellant was accorded the opportunity to appeal to the Governor of BNM against the decision to dismiss him and in doing so, he had mitigated against the punishment.

[43] The same issue regarding the right to make representations on punishment in disciplinary proceedings was dealt with by the Federal Court in the case or *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417. The issue in that case was confined to the provisions of art 135(2) of the Federal Constitution involving public servants in that no member of a public service shall be

dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[44] Even with the express provisions of art 135(2) of the Federal Constitution, yet the Federal Court in that case ruled that there is no separate right to make representations upon the punishment that ought to be meted to the officer to be dismissed or reduced in rank; and no injustice was occasioned by the failure to hear the mitigation separately.

[45] In the present case, art 135(2) of the Federal Constitution and the general orders do not apply. There is no express provision relating to the right to mitigate upon punishment accorded to the employees in the terms and conditions of their employment with BNM. Therefore the irresistible conclusion is that no such right ought to be meted to the appellant. In any event, the court is satisfied that the representation or mitigation made by the appellant in his appeal to the Governor of BNM before the punishment was affirmed, is sufficient.

[46] The court is satisfied that the BNM's decision to dismiss the appellant on all the five charges of misconducts against him was a reasonable decision in view of the circumstances of the case. His misconducts are serious in nature. Being the employer, BNM is in the best position to determine the seriousness of the appellant's misconducts. In this respect the court is in full agreement with NH Chan JCA (dissenting) in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, when he said:

> ... The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

[47] In the present case, the court is satisfied that it was reasonable for BNM to have taken the view that dismissal was the appropriate punishment. The 'offences' or misconducts for which the appellant had committed were serious and grave in any establishment and that it was quite reasonable for BNM as the employer, to dismiss him.

CONCLUSION

[48] Having regard to all the circumstances of the case, this court,

unanimously holds that the appeal herein is without merit and therefore be dismissed with costs of RM500 to be paid to the respondent.

Appeal dismissed with costs.

Reported by Kohila Nesan